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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York; and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellant appeals from an order of the United States District Court for the Southern District of New York, entered on December 14, 1966, which denied an interlocutory injunction to appellant and also dismissed the complaint, and submits this Statement to show this court that it has jurisdiction on the appeal and that a substantial question is involved.

Opinion Below

The District Court wrote an opinion which is appended hereto as Appendix A, *post* 12. It is not yet reported.

Jurisdiction

(i) This case arises from an order of a three-judge district court, entered in the United States District Court for the Southern District of New York, which denied the application of the appellant for an injunction, and dismissed the complaint.

(ii) The order was made on December 13, 1966 and entered in the said District Court on December 14, 1966, Appendix B, *post* 21.

The Notice of Appeal was filed on December 16, 1966 in the said District Court.

(iii) The jurisdiction of this court is conferred by 28 U.S.C., Section 1253.

Statute Involved

The statute involved is Section 887, subd. 1 of the Code of Criminal Procedure of the State of New York (McKinney's Consolidated Laws of New York, volume 66, part 3).

"Section 887. Who are vagrants.

"The following persons are vagrants:

"1. A person who not having visible means to maintain himself lives without employment."

"Section 892. Certificate to constitute record of conviction, and to be filed; commitment of vagrants

"The magistrate must immediately cause the certificate which constitutes the record of conviction, together with the testimony taken before him as to the residence of such vagrant, to be filed in the office of

the clerk of the county, and must, by a warrant signed by him, with his name of office, commit the vagrant for not exceeding six months at hard labor, to the penitentiary or county jail. In those counties of the state where the distinction between county poor and town poor is maintained, the expense of the conviction and maintenance during the commitment of any vagrant committed to the county jail, who shall, at the time of such commitment, have obtained a legal settlement in one of the towns of the county in which said persons shall be convicted, shall be a charge upon the town where they may reside at the time of such commitment."

Construction of the Statute

This statute has been authoritatively construed in *People* v. *Sohn*, 269 N. Y. 330, 334-335, as follows:

> "We think this is what our statute does mean when the words 'vagrants,' 'visible means of support' and 'without employment' are used. Long usage has fixed their significance. These words taken together indicate that the thing aimed at is the loafer or lazy man, the one who hangs about streets and public places without employment or visible means of support when he could with effort obtain something to do. It would be absurd to say that one physically unable to work or an able-bodied person who could not get work came within the meaning of this section."

The statute is used as a pretext for unlawful detention. *People* v. *Robinson*, 13 N. Y. 2d, 296, 301; *People* v. *Davis*, 13 N. Y. 2d, 690.

Questions Presented

1. Is Section 887, subd. 1 of the Code of Criminal Procedure of the State of New York repugnant to the Constitution of the United States?

2. Did the District Court abuse its descretion by abstaining from deciding the constitutional question squarely drawing into question the Constitution of the United States?

3. Should the District Court have dismissed the complaint without rendering judgment on the merits of appellant's constitutional claims?

Statement

The appellant commenced this action for a declaratory judgment and injunction in the United States District Court for the Southern District of New York. Almost all of the essential allegations in the complaint are matters of public record; some appear as transcripts of public records and are set forth as exhibits to the complaint. Others appear in the record of appeal in the New York Court of Appeals in *People* v. *Fenster*, 17 N. Y. 2d, 641 and in *People* v. *Fenster*, 46 Misc. 2d, 179.

The appellant alleged that in three successive months, October 1964, November 1964 and December 1964, he was each time arrested and prosecuted under the above vagrancy statute and each time the charges against him were dismissed for failure of proof under the statute. Each time appellant was prosecuted, he was subjected to arrest, overnight detention, arraignment, expenses of making bail and to the expense of counsel fees.

The dismissal of the December 1964 charge did not occur until a few days before the commencement of this action, for after that successive monthly arrest, he retained his present counsel who instituted a prohibition proceeding in the New York Supreme Court. That prohibition proceeding made claim that the criminal court was without jurisdiction because the statute in question was repugnant to the Constitution of the United States. In the meantime,

during the litigation of the prohibition proceeding, all the way through the New York Court of Appeals, the December prosecution was stayed or continued through court orders.

The New York Supreme Court denied the request for a prohibition judgment in favor of Fenster, not because the remedy was wrong, as the District Court mistakenly states. It denied the remedy because it held the statute constitutional. Instead of the remedy being wrong, the Supreme Court had held that the remedy was a correct one (46 Misc. 2d 179). But because the remedy is discretionary, it proved to be improvident for the purposes of appeal. The Court of Appeals expressly refused to review the merits, 17 N. Y. 2d 641, as without its jurisdiction, contrary to its prior decisions in *Kraemer* v. *County Court of Suffolk County*, 6 N. Y. 2d 363, and *Matter of Murtagh* v. *Leibowitz*, 303 N. Y. 311; *Matter of Baltimore Mail S.S. Co.* v. *Fawcett*, 269 N. Y. 379, 383.

The decision of the New York Court of Appeals occurred on March 24, 1966. After reargument was denied, the December 1964 prosecution proceeded to trial and resulted in a dismissal on June 27, 1966 for what had become routine insufficiency of evidence.

This action was immediately commenced on June 29, 1966.

During the litigation of the prohibition application, Fenster was threatened by the police officer who had arrested him that as soon as the December charge was disposed of, he would again be arrested on a charge under the statute and he was given the same warning by another officer of the precinct, the last such threat taking place in May 1966.

The appellant, fearful of repeated harassments under the cloak of this statute, instituted this action to gain some peace of mind. What with the monthly arrests, monthly

arraignments and monthly appearances for trial, there had been little opportunity afforded to him to enjoy the freedom and privacy any person is entitled to.

In this action, after setting forth the above facts which are matters of public record, he requested that the District Court declare the statute as repugnant to the Constitution of the United States and to enjoin its enforcement.

The defendants appeared and substantially admitted the foregoing, except they denied the allegation of the threats made to Fenster during the litigation of the prohibition proceeding, that he would be again prosecuted. Such a denial is inconsequential, for actions speak louder than words. Under any reasonable inference or computation of mathematical probabilities, a pattern of repeated arrests casts a stronger shadow of fear of the future than would proof of a verbalized threat.

Appellant made an application for a three-judge court based on the substantiality of his claims. Against the opposition of appellees, the motion was granted. A three-judge court was convened which heard the application for an interlocutory injunction. The application for an interlocutory judgment was denied and the complaint was dismissed.

The District Court in its opinion held that the court had jurisdiction, but should abstain from rendering any relief, because under New York law Fenster has a remedy by way of declaratory judgment for the relief he seeks.

The Questions Are Substantial

1. The order of the District Court should be reviewed because it involves an important question under the Constitution of the United States. This court has never passed upon the validity of vagrancy laws (*cf. Edelman* v. *California*, 344 U. S. 357; *Hicks* v. *District of Columbia*, 15 L.

ed. 2d 744). The New York law, we submit, is one especially of significance because of the construction placed upon it by the New York Court of Appeals in *People* v. *Sohn,* 269 N. Y. 330, 334-335. There the court said that the law was directed against loafers or lazy men who are without employment or without means of support and are found on streets or public places.

The statute as so read, we contend, is repugnant to the Constitution of the United States as a denial of due process: It makes indigence or lack of employment as a test whether a person may be sent to jail for six months under Section 892. (Sohn received a sentence of 30 days in jail.) The statute is directed against the loafer and lazy person. We submit, that a person may be a loafer or lazy in the street, or in public places, without incurring the penalties of the statute. *Edwards* v. *California,* 314 U. S. 160, supports this argument. Moreover, being a loafer or lazy with or without funds is not an act for which a person may incur prosecution; rather it is a condition of a person which this court in *Robinson* v. *California,* 370 U. S. 660, has protected.

The statute as construed also denies a person the equal protection of the laws. Under the statute a person with visible means of support may be a loafer or lazy, but not one not so circumstanced. There is also in this an implicit violation of the Thirteenth Amendment.

The statute evidently intends to penalize as a preventative measure against crimes that a person *might* commit. But our jurisprudence does not accept such anticipatory measures as valid, *Edwards* v. *California.*

Whatever purpose such a statute may have served in another era, it does not satisfy modern objectives, what with the proliferation of welfare agencies, employment agencies, social security and other forms of aiding the financially handicapped.

2. Since the constitutional question involved is one of public importance and special circumstances appear, the District Court should not have abstained. The special circumstances in this case cry aloud for relief: Fenster has already been subjected to three successive monthly prosecutions under an invalid law, with more promised to him. Although he has shown that his prosecutions were instituted for harassment and in bad faith, the District Court nevertheless suggested that his remedy is solely in a state court by way of declaratory judgment. By this disposition, the District Court has in effect decided that equitable jurisdiction should not be exercised if a remedy for declaratory judgment exists by a state law. But that is not the law. This court in *Baggett* v. *Bullitt*, 377 U. S. 360, decided contrariwise, for in that case, a state remedy for declaratory relief did exist. Moreover, since such relief is a discretionary remedy in the New York courts (*Delaware Lackawana Railroad Co.* v. *Slocum*, 299 N. Y. 496, 505), the remedy there would be no different than it is in the federal courts. And in that respect it is no different from his abortive prohibition remedy, which too is discretionary.

The suggestion by the District Court that Fenster await a new prosecution at which to challenge the statute is unfortunately impractical, as it does not solve the problem. Firstly, in the face of what has already occurred with respect to the three successive monthly prosecutions indicates that the arrests and prosecutions under the statute come to nought because they are without the slightest substance. Secondly, why should a person in a civilized community, a victim of abuse under color of a statute be required to live in continuous apprehension of arrest in the hope of ultimate vindication of his claim that the statute is invalid? Thirdly, because he is a "vagrant" he occupies a status, and is thus subject to repetitious monthly, weekly or daily arrest! Why should he be a victim of a law that allows

such prosecutions? Such martyrdom should not be expected of the hardiest soul, not to mention the indigent, unemployed and lazy loafer, against whom the statute is directed.

The result is that Fenster has no remedy against the terror of repeated arrests, save the reversal by this court of the order appealed from.

Dombrowski v. *Pfister,* 380 U. S. 479, has recently shown that this court does not expect a person to play a martyr's role before he can receive relief in a federal court against an invalid statute. Fenster's special circumstances are even stronger than those of *Baggett* and *Dombrowski,* for Fenster has been subjected already to three successive prosecutions under an invalid statute, with threats of more to come.

While *Baggett* and *Dombrowski* involve First Amendment protections of speech and association, the principle is not limited to cases under the First Amendment. Certainly, the right to be left alone from repeated prosecutions under an invalid statute ranks high in constitutional protections, for it serves a person little to be able to speak freely, if he must spend a substantial part of his time to free himself from bad-faith prosecutions.

In *Evers* v. *Dwyer,* 358 U. S. 202, which was *not* a First Amendment case, this court held in an action commenced in a District Court, that relief should have been afforded by a three-judge court to a complaint that an ordinance, used to compel a person to sit in a segregated part of a public conveyance, was invalid. The plaintiff in that case sought to use a municipal bus. He had been ordered by the driver to comply with the ordinance by sitting in a part designated for negroes. He refused to comply and was threatened with arrest by police offices who had been summoned. Plaintiff left the bus instead of complying. Thereupon, he instituted an action in a federal court to restrain enforcement of the ordinance. This court held

that the complaint should not have been dismissed and that under the circumstances, the special disabilities imposed by the statute provided plaintiff with "a substantial immediate and real interest in the validity of the statute".

See also, Fordham Law Review, Volume 34, p. 71, *Dombrowski* v. *Pfister*: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Relations, p. 94.

Since the action is one for the protection of a fundamental human right, it does not fall into the class of cases, which seek redress of economic rights, such as *Spielman Motor Sales Co. Inc.* v. *Dodge*, 295 U. S. 89. Even as to the latter class, see *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 328, where at stake was the right to deliver bottles of liquor at an international airport. Certainly, Fenster's claim against successive bad faith prosecutions under an invalid statute, ranks in "special circumstances" as high as the right to deliver liquor.

Moreover, as the statute condemns a person because of his status, it enables successive prosecutions not only on a monthly basis, but on a daily or even hourly basis. Thus, Fenster may be prosecuted under this statute at any time the police will. A fair inference is that it is only the pending positive action that Fenster has taken that has discouraged further prosecutions, albeit, he fears, only during this litigation.

And this case of course, is not one in which it is sought to stay a prosecution already pending in a state court, such as *Stefanelli* v. *Minard*, 342 U. S. 117 (28 U.S.C. § 2283). Nor is it an application seeking a removal of an action under 28 U.S.C. 1443(2), *Greenwood* v. *Peacock*, —— U. S. ——, 16 L. ed. 2d 944.

3. Since there are no substantial issues of fact in this case, this court need not remand it, but may determine it itself, as it did in *Baggett*. This statement is not attenuated by the

affidavit of appellee Leary in which he states that no further prosecutions of Fenster under the statute are contemplated. As a public officer charged with the enforcement of the statute he cannot enter into a valid undertaking not to enforce a penal provision. The plain fact is that the actions of the police in this case speak louder than their words. The pattern of successive monthly arrests satisfy any exacting demonstration of probable future prosecution.

Conclusion

It is submitted that enough special circumstances have been shown to warrant the conclusion that the District Court was in error in not exercising its equitable jurisdiction, and since substantial constitutional questions are involved, review should be accorded to this case. The questions involved in this appeal are not only substantial, but are of public importance.

Respectfully submitted,

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APPENDIX A

Opinion.

TENNEY, *District Judge:*

On motion of plaintiff, a three-judge court has been convened pursuant to Title 28 U.S.C. § 2284 (1964). Plaintiff seeks an order enjoining the defendants from prosecuting him under subdivision 1 of Section 887 of the Code of Criminal Procedure of the State of New York, which plaintiff contends violates the fourteenth amendment by denying him due process of law, the equal protection of the laws, and by inflicting cruel and unusual punishment. He further contends that the statute is repugnant to the thirteenth amendment and denies him the privileges and immunities of citizens of the United States. Plaintiff also seeks a declaratory judgment that the statute is repugnant to the Constitution as already indicated, and a preliminary injunction pending the determination of this action.

Defendants Leary and Koota, while taking no position on the alleged unconstitutionality of the statute we are considering, request this Court to apply the traditional doctrine of abstention and to decline to exercise jurisdiction. While it is clear that this Court has jurisdiction pursuant to Title 28 U.S.C. § 1343(3) (1964), and has the power to issue a declaratory judgment, Title 28 U.S.C. § 2201 (1964), for the reasons we shall state, we believe that the facts present a proper case for absention, and accordingly the complaint will be dismissed.

The New York statute under attack reads as follows:

"Section 887. Who are vagrants

The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment."

Appendix A.

Under Section 892 of said Code of Criminal Procedure, a person found to be a vagrant may be committed to the penitentiary or county jail for a period not to exceed six months at hard labor. From the allegations of the complaint, it appears that plaintiff was arrested and charged with being a vagrant in violation of said statute on three occasions, viz., September 30, 1964, November 13, 1964, and December 11, 1964.

On each of the first two occasions plaintiff was, on the day of arrest, acquitted on the ground that the prosecution failed to establish sufficient facts to support a conviction of the plaintiff under the statute.

With respect to the third arrest, plaintiff commenced a proceeding in the nature of prohibition on December 18, 1964, in the Supreme Court of the State of New York, County of Kings. He sought a judgment against the Criminal Court of the City of New York prohibiting it from proceeding with his prosecution on the ground that § 887(1) was unconstitutional. A stay of the Criminal Court proceedings was granted, but on April 3, 1963, the Supreme Court dismissed plaintiff's petition (*Fenster* v. *Criminal Court*, 46 Misc. 2d 179, 259 N.Y.S. 2d 67). This dismissal was subsequently affirmed on October 25, 1965, by the Appellate Division of the Supreme Court, Second Judicial Department (24 App. Div. 2d 840, 263 N.Y.S. 2d 1010 (mem.)).

An appeal taken to the Court of Appeals of the State of New York was grounded on claims of constitutional violations; that Court, however, affirmed the judgment on March 24, 1966, on the sole ground that the denial was within the discretion of the lower court. The Court of Appeals expressly stated that it reached no other question (17 N. Y. 2d 641, 216 N. E. 2d 340, 269 N.Y.S. 2d 139). A motion to reargue was denied by the Court on June 2, 1966, and on June 27, 1966, the charge against plaintiff proceeded to prosecution in the Criminal Court. Once again he was,

on the same date, acquitted on the ground that the prosecution failed to establish sufficient facts to support a conviction under the statute.

Plaintiff alleges that he was held in nighttime confinement, arraigned and subjected to the expense of furnishing bail and counsel fees. Plaintiff further alleges that he has been threatened with further arrests under said statute as recently as May of this year, and that he fears another arrest unless this Court affords him the relief requested herein.

Defendant Leary is presently Commissioner of Police of the City of New York, and defendant Koota is the District Attorney of the County of Kings. Defendant Leary has filed an affidavit herein denying knowledge of any such threats having been made against plaintiff, and further stating that the Police have no intention of again arresting plaintiff as a vagrant.

In *Ex parte Young*, 209 U. S. 123 (1908), which has been called "the fountainhead of federal injunctions against state prosecutions",[1] the power of a federal court to enjoin a prosecution by a state official under a state statute unconstitutional on its face was upheld. "Since that decision, however, considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.'" Accordingly, such power will not be exercised save in exceptional cases "to prevent irreparable injury which is clear and imminent." *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943).

In *Harrison* v. *NAACP*, 360 U. S. 167 (1959), the Supreme Court vacated the judgment of a three-judge statutory court permanently enjoining officials of the Commonwealth of Virginia from enforcing certain statutes which imposed conditions upon the right to make public solicita-

tion of funds and to expend such funds for litigation involving racial segregation. In referring to the doctrine of abstention, the Court stated that

> "in the service of this doctrine, which this Court has applied in many different contents, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Id.* at 176.

The type of special circumstance calling for exercise of federal jurisdiction rather than adherence to the doctrine of abstention is found in the Supreme Court's recent decisions in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), and *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The statutes in *Baggett* required a loyalty oath as a condition of employment for teachers and State employees. In finding that the administration of the oath constituted sufficient irreparable injury to warrant avoidance of the abstention doctrine, the Court reasoned that the inherent vagueness of the oath prevented the oath-taker from determining permissible future conduct so as to avoid violating his oath and exposing himself to prosecution.

The Court was also concerned that a delay in adjudication on the merits could be "costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." 377 U. S. at 379. Resort to the State courts, it pointed out, could result in "piecemeal" and unduly protracted litigation. To abstain, it argued, would not open the way for a State court determination of the constitutional issue which would terminate the litigation—it would serve to prolong the litigation during which time the existence of the challenged statutes would abridge free expression, and their threatened application would discourage or "chill" protected activities.

This theme was repeated in *Dombrowski,* where the Court emphasized that abstention was not appropriate where unconstitutional vagueness deters the exercise of first amendment freedoms. Moreover, in that case, the good faith of the enforcement officers was attacked and there seemed little likelihood of a successful resort to the State courts to vindicate the defendant's rights.

Thus, in both *Baggett* and *Dombrowski,* the Court concluded that the vagueness of the statutes could not have been eliminated except by multiple prosecutions in the State courts, and in both cases the Court refused to apply the doctrine of abstention when its application and the resort to the State tribunals would prove ineffective in vindicating constitutional rights, or, more particularly, the right of free expression.

The exceptional nature of the circumstances before the Court in *Dombrowski,* as distinguished from those presented here, was emphasized in the recent case of *Zwickler* v. *Koota,* 66-C-375 E.D.N.Y., Sept. 19, 1966, where a three-judge court abstained from a determination of the constitutionality of Section 781-b of the New York Penal Law which prohibits, among other things, the distribution of anonymous political literature in quantity. Zwickler had previously been convicted of a violation of this section. His conviction was subsequently unanimously reversed on the facts, the constitutionality of the statute not being reached. He expressed fear of future prosecution in view of his intention and desire to distribute further copies of the anonymous leaflet which had occasioned his prior arrest.

Although Zwickler relied heavily upon *Dombrowski,* the three-judge court, after full discussion of the doctrine of abstention, held, with one judge dissenting, that the case did not present the special circumstances to justify the exercise of Federal judicial equity power. The Court in

Zwickler, noting that the Supreme Court's decision in *Dombrowski* did not repudiate the doctrine of abstention in all cases involving fourteenth amendment rights, emphasized the suitability of the New York provisions for a declaratory judgment action. N.Y.C.P.L.R. § 3001.

The instant case is clearly distinguishable from *Dombrowski* and *Baggett*. Plaintiff does not claim that the statute is vague or that prolonged litigation in the State courts would be required to determine its constitutionality. Neither does he claim that first amendment rights are involved. He asserts in his memorandum of law that to penalize a person because he is poor or is an idler is outmoded in today's society; that vagrancy statutes have been improperly used, and, in his case, are employed as an instrument of harassment; that the statute is unconstitutional because it (a) "interferes with and impairs the liberty of a citizen to exercise his faculties as long as he does not interfere with others"; (b) "punishes a person because of his status"; (c) "requires involuntary servitude in violation of the Thirteenth Amendment"; (d) "denies plaintiff the equal protection of the laws"; and (e) deprives plaintiff "of the privileges and immunities guaranteed by the Federal Constitution." He also makes reference to cruel and unusual punishment, stating that repeated offenses may incur repeated penalties, an argument scarcely of constitutional dimensions.

Nowhere does plaintiff assert that the statute is facially unconstitutional "as abridging free expression" or that as in *Dombrowski* it has been applied for such purposes. The constitutional challenge to this statute which emerges is that the type of conduct, or "status", if you will, that is covered thereby cannot constitutionally be proscribed. There is no showing of inability to obtain vindication of plaintiff's constitutional rights in any subsequent state prosecution, either by preliminary motion attacking the

statute's constitutionality or by motion to arrest judgment, with right of appeal from the trial court's determination. Clearly, the disputed claim of further harassment of plaintiff does not approach the dimensions of the harassment in *Dombrowski*, which "resembled only too closely those tactics employed by totalitarian regimes dedicated to suppressing freedom of expression.'"

As heretofore noted, no claim is made that the statute is so vague that resort to the State's declaratory judgment procedures would be unavailing, as was suggested in *Baggett*. This case, therefore, more closely resembles that described by the Supreme Court in *Baggett*, as follows:

> "In the bulk of abstention cases in this Court, including those few cases where vagueness was at issue, the unsettled issue of state law principally concerned the applicability of the challenged statute as to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation." 377 U. S. at 376-77. (Footnotes omitted.)

Plaintiff's lack of success in seeking an order of prohibition in the New York courts does not call for exercise of Federal jurisdiction, since prohibition was the wrong remedy. The remedy of prohibition in New York is an extraordinary one, available only upon a clear showing that a court or body possessing judicial powers is exercising, or threatening to exercise, jurisdiction over matters not within its cognizance. N.Y.C.P.L.R. § 7801; *People ex rel. Livingston* v. *Wyatt*, 186 N. Y. 383; 79 N. E. 330 (1906). It is viewed with caution, limited to cases of extreme necessity, resorted to with infrequency, and not favored. *Cooley* v. *Wilder*, 234 App. Div. 256, 255 N. Y. Supp. 218 (4th Dep't 1932); see *Culver Contracting Corp.*

v. *Humphrey,* 268 N. Y. 26, 196 N. E. 627 (1935). As a general rule it is issued not as a matter of right, but only in the exercise of sound discretion, and then only where it is clearly shown that no other adequate remedy is available. Where a defendant in a criminal proceeding will have the opportunity to raise the question of the court's jurisdiction, either by motion at the commencement of trial or in arrest of judgment, with a right of appeal from an adverse decision, a prohibition order has been denied. *Kenler* v. *Murtagh,* 12 App. Div. 2d 662, 209 N.Y.S. 2d 384 (2d Dep't 1960 (mem.); *People ex rel. New York Disposal Corp.* v. *Freschi,* 173 App. Div. 189, 159 N. Y. Supp. 23 (2d Dep't 1916); *Rose* v. *McKean,* 190 Misc. 982, 76 N.Y.S. 2d 391 (Sup. Ct. 1948). And this principle has been involked to avoid passing upon the constitutionality of a criminal statute. *People ex rel. Burbank* v. *Wood,* 21 App. Div. 245, 47 N. Y. Supp. 676 (2d Dep't 1897).

Unlike a petition for an order of prohibition, an action for a declaratory judgment (N.Y.C.P.L.R. § 3001) has been recognized in New York as a remedy available to a defendant seeking to test the constitutionality of a New York criminal statute under which prosecution is threatened. *New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority,* 285 N. Y. 272, 34 N. E. 2d 316 (1941); *De Veau* v. *Braisted,* 5 App. Div. 2d 603, 174 N.Y.S. 2d 596 (2d Dep't 1958), aff'd 5 N. Y. 2d 236, 157 N. E. 2d 165, 183 N.Y.S. 2d 793 (1959), aff'd 363 U. S. 144 (1960).

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which

> are involved in the dispute and thereby run the risk of such prosecution (*New York Foreign Trade Zone Operators* v. *State Liq. Auth., supra,* p. 278)." *De Veau* v. *Braisted,* 5 App. Div. 2d at 607, 174 N.Y.S. 2d at 600.

There is no suggestion that in a declaratory judgment proceeding the courts of New York would be less enlightened than the Federal courts.

Furthermore, should "special circumstances" arise which would not justify further abstention, plaintiff may seek appropriate relief in the Federal courts.[4]

The complaint is dismissed by order of this Court. Settle an order consistent herewith on or before ten (10) days from the date hereof.

Dated: New York, New York,
December 7, 1966.

HON. IRVING R. KAUFMAN, U.S.C.J.
HON. CHARLES H. TENNEY, U.S.D.J.
HON. WALTER R. MANSFIELD, U.S.D.J.

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[1] Pg. 6. *Dombrowski* v. *Pfister,* 380 U. S. 479, 483 (1965).

[2] Pg. 6. *Id.* at 484. (Footnote omitted.)

[3] Pg. 11. Concurring opinion of Kaufman, C.J., in *Zwickler* v. *Koota,* 66-C-375, E.D.N.Y. Sept. 19, 1966.

[4] Pg. 14. See, *e.g., Monroe* v. *Pape,* 365 U. S. 167 (1961).

APPENDIX B

Order.

Docket No. 66 Civ. 1927

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CHARLES FENSTER,

Plaintiff,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Defendants.

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 887, Subd. 1 of the Code of Criminal Procedure of the State of New York on the ground the said law is unconstitutional, and for a declaratory judgment, declaring said statute to be repugnant to the Constitution of the United States, and for convening of a statutory three-judge court to hear said application; and the motion for the convening of a statutory three-judge court having been granted by the Hon. Charles H. Tenney, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the Second Circuit, the Hon. Charles H. Tenney, Judge of the United States District Court for the Southern District of New York and the Hon. Walter R. Mansfield, United States District Judge for the Southern District of

New York, having been convened on October 21, 1966 and the said application having been heard on said date and the said court having filed its opinion on December 7, 1966 in favor of the defendants, wherein in its discretion the Court abstained from exercising jurisdiction in the action,

ORDERED, that the motion of the plaintiff for a preliminary injunction be and the same is hereby denied; and it is further

ORDERED, that the complaint be and hereby is dismissed.

Dated: the 13th day of December, 1966.

IRVING E. KAUFMAN,
United States Circuit Judge.

CHARLES H. TENNEY,
United States District Judge.

WALTER R. MANSFIELD,
United States District Judge.